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ably be expected?" These words are not to be understood in the sense put upon them by Mr. Montagu Smith. The jury found that the adulteration was not reasonable, and the Chief Justice is satisfied with the verdict.

WILLES, J.—In effect, the question left to the jury was, "Was the linseed so mixed as to have lost its distinctive character?" If it was so mixed, the defendant was answerable for a breach of his contract. The purchaser's expectation was, that he would get Calcutta linseed of the quality known in the trade as Calcutta linseed. In this case he did not get what he bargained for. As if a man buys gold, bargaining for it to be of 24 carats of fineness, and he gets gold of one carat of fineness, no one can say that he has got what he bargained for.

JERVIS, C. J. concurred.

Rule refused.

In the Court of Exchequer—January 16, 1856.

DAVIES *vs.* ROPER.[1]

In a case involving no question of law the plaintiff's claim was supported almost exclusively by his own testimony, and was encountered by circumstantial evidence on the part of the defendant. A common jury having found for the plaintiff, a new trial was granted on affidavits disclosing fresh evidence. At the second trial, this evidence was adduced, but the second jury (a special one) found for the plaintiff. The judge certifying to the court in writing that the verdict was "a very wrong verdict," the court granted a third trial, on the ground of its being against the weight of evidence.

This was an action for an illegal distress for rent, to which the defence was that the distress was lawful. The plaintiff, a poor man, had built a cottage on some waste land, and occupied it for several years; at the end of which time the defendant, a gentleman of fortune in the neighborhood, made the distress in question upon that land, on the ground that the plaintiff was his tenant, and had on former occasions paid rent to him for it. The cause was tried at Chester, before Williams, J., and a common jury, when a verdict

[1] London Jurist, vol. 20, p. 167.

was returned for the plaintiff. A rule was obtained to set aside this verdict as being against the weight of evidence, and on affidavits disclosing fresh evidence, which, after argument, was made absolute on the latter ground. The cause was tried a second time at the same place, before Jervis, C. J., and a special jury, when, notwithstanding this additional evidence, another verdict was found for the plaintiff. No question of law arose on either trial, the question at each simply being whether the plaintiff was a free occupier of the land in dispute, or held it as tenant to the defendant. The plaintiff's case on both occasions was supported almost exclusively by his own testimony; and was encountered on the part of the defendant by a mass of circumstantial evidence, consisting chiefly of statements at variance with it made by the plaintiff in the course of conversation with different persons. A rule was obtained to set aside this second verdict as against the weight of evidence, Jervis, C. J., on being applied to, certifying to the court in writing that the verdict was "a very wrong verdict."

Grove and *E. V. Williams* showed cause. Independently of the merits of this case, it raises an important constitutional question—whether, when two successive juries have found in favor of a litigant party on a mere question of conflicting testimony, with no matter of law involved, the court will set aside the second verdict because they deem it erroneous. The true principle on this subject is that stated in *Wood* vs. *Gunston*, (Sty. 466), "The discretion of the court to grant a new trial must be a judicial and not an arbitrary discretion." And in a case in the Queen's Bench, where the judge of a county court had granted several new trials, the court said he was wrong. [MARTIN, B.—Did you ever know an instance of the court having refused a new trial where the judge who tried the cause certified the verdict to be a very wrong one?] Frequently, when the application was for a *second* new trial. [MARTIN, B.—I never knew such an instance when the judge took the trouble of writing it down, as he has done here.] If parties are concluded by the mere opinion of the judge upon the evidence, trial by jury is at an end, and trial by judge substituted for it. [PLATT, B.—The reference which the court makes to the judge by whom the cause

is tried, is merely to inform their own conscience.] Will the court, then, grant new trials ad infinitum if the several successive judges by whom the cause is tried pronounce the several successive verdicts erroneous? [ALDERSON, B.—It is not correct to speak of the two verdicts in this case as similar, for fresh evidence was brought before the second jury.] No two verdicts can ever proceed on exactly the same evidence. [ALDERSON, B.—If this case had arisen under the old system, when the parties could not be examined, you would have had no witness at all. A man may now swear himself into an estate; besides which, the evidence of the plaintiff here is opposed by contrary testimony.] None contradicting him directly. [They likewise argued the case on its merits.]

Welsby, who appeared to support the rule, was not called on.

ALDERSON, B.—There must be a third trial—that is all. The case is not like the one we had this morning, where the judge merely reported that he should not have found as the jury did. Here we have the opinion of the judge, who saw the witnesses, and knows all the circumstances of the case better than we can, that the verdict is a very wrong verdict.

PLATT, B.—The judge by whom the cause is tried hears the addresses of counsel to the jury, who often form their opinion on topics addressed to their prejudice, such as one of the parties being a poor man and his antagonist a rich one. That is just this case.

MARTIN, B.—I believe judges are most careful not to interfere with the verdicts of juries, but if a verdict is to stand when the judge says it is a very wrong verdict, trial by jury will become a great evil.

The rule was then made absolute, costs to abide the event. [1]

[1] This case, so trivial in itself, has been reported for the sake of the constitutional principle it involves. The question divides itself into two parts—first, whether previous to the Evidence Act, 14 & 15 Vict. c. 99, the courts would set aside an indefinite series of verdicts given on a disputed fact, if the judges by whom the cause was tried expressed their opinion, either verbally or by writing, that those verdicts were very wrong ones; and, secondly whether any change in this respect has been effected by that statute. Where, indeed, a jury find what is called a "*perverse* verdict," i. e. refuse to listen to the law as correctly laid down to them by the judge, (per Parke, B., in *Mould* vs. *Griffiths*, 8 Jur. 1010; per Pollock, C. B., in *Saunders* vs. *Davies*, 16 Jur. 481), a new trial is grantable ex debito justitiæ; and if

any possible number of successive juries were to find in the same way, the verdicts would be set aside, for in such cases the jury everstep their province and invade that of the judge. And the same holds where a jury, or series of juries, disregard a præsumptio juris, i. e. a presumption of law which might be made by the court without their intervention; (1 Ph. Ev. 467, 10th ed.); for presumptions of this class are part of the law itself. So if they take on themselves to find a verdict where the judge tells them truly that there is no evidence, for whether there is *any* evidence is a question for him: (1 Ph. Ev. 3, 4, 10th ed.) But where a jury disregard a presumption of mixed law and fact, and a fortiori where they find in a particular way on a mere question of conflicting testimony, all the authorities agree, and the 35th section of the Common-Law Procedure Act, 1854, recognizes, that the granting a new trial is only matter for the discretion of the courts, which are moreover very cautious in the exercise of this power: (See Ph. & Am. Ev. 459, 460; Stark. Ev. 803, 4th ed.; *Swinnerton* vs. *The Marquis of Stafford*, 3 Taunt. 232; *Foster* vs. *Allenby*, 5 Dowl. 619). A strong illustration is afforded by the case of *Foster* vs. *Steele*, (3 Bing. N. C. 892). There two successive juries having found for the plaintiff on the question of the seaworthiness of a ship, the court of common pleas, though dissatisfied with the verdicts, was equally divided as to whether a third trial should be granted; Tindal, C. J., and Park, J., holding the negative, and Vaughan and Coltman, JJ., the affirmative; but the whole court agreed that if a third jury were to find in the same way the proceedings should stop. The disregard by a jury of a presumption of mixed law and fact, affords much stronger ground for the interference of the court than where the question is only one of conflicting evidence, and we apprehend that the principle on which new trials are granted at all in the latter case is this—that although the jury are the constitutional judges of the facts in dispute, still if their verdict appears against the weight of the evidence, the court will presume that they have labored under some mistake or misapprehension, or been carried away by some prejudice, or influenced by some corrupt motive which cannot be detected, and in order to prevent a defeat of justice from any of these unascertained sources, sends the case to another jury. The reference usually made on such occasions to the judge by whom the cause was tried, for his judgment on the evidence, is merely, as observed by Platt, B., in the text, to inform the conscience of the court. But when a succession of juries find in the same way, not only would such a presumption be violent and unreasonable, but the very fact raises a presumption of an opposite kind, namely, that there must have been some ground for those findings which escaped the observation of the presiding judges; e. g. that the juries remembered some piece of evidence which the judges forgot, or saw something in the demeanour of the witnesses which eluded their observation—twenty-four eyes see more than two, especially when those two are already occupied in making a note. We once saw five men tried for a burglary, before a very accurate and painstaking judge, who summed up for a conviction as to three, and for an acquittal as to the fourth, and directed an acquittal of the fifth. The jury convicted all five, and being remonstrated with by the judge, it came out on inquiry that their verdict against the fourth and fifth prisoners was found on a piece of evidence affecting them,

which he had overlooked, as the judge himself had afterwards the candor to admit The remaining question is, whether any alteration has been effected in this matter by the Evidence Act, 14 & 15 Vict. c. 99, which renders the parties to a cause competent witnessess. No doubt there is considerable force in the observation of Alderson, B., in the text, that a man may now *swear himself* into an estate; at the same time it may be as well to remember that before the statute he might by means of perjured testimony have *bought himself* into it. Taking all the circumstances of this case of *Davies* vs. *Roper* into consideration, it might be going too far to say that the court in granting the second new trial overstepped their constitutional authority; but the *principle* obviously involved in the language of the barons, that the stability of every verdict on matter of facts is to depend for the future on the approval of the judge by whom the cause was tried, is rather an alarming one, and if followed up by subsequent decisions, will prove an offshoot from the Evidence Act little contemplated by its framers.—JURIST REPORTER.

NOTICES OF NEW BOOKS.

REPORTS OF CASES ARGUED AND DETERMINED IN THE SURROGATE'S COURT OF THE COUNTY OF NEW YORK. By Alexander W. Bradford, LL. D., Surrogate. New York: John S. Voorhies, Law Bookseller and Publisher, 20 Nassau street, 1856.

This series of Reports was commenced in June, 1851. In this volume the cases are brought down to February, 1856, and in the three volumes of the series, we have all the decisions hitherto published, of the learned Surrogate of New York. Taken together, they form a body of what we may call, for want of a better name, American Ecclesiastical Law, nowhere else to be found in our libraries: and it is some satisfaction for the American lawyer to have volumes like these, to place by the side of Phillimore and Haggard, and to know they are worthy of a place on the same shelf with the decisions of Stowell and Nichol. It is especially satisfactory to see this branch of law, hitherto so generally, so unaccountably neglected by our reporters and authors, in hands every way capable of doing it justice, and of developing into something like system our testamentary law.

With the exception of marriage and divorce, the only subjects of interest to the profession here in the English Reports of this class, are those of wills and administration. The peculiar cases growing out of church and parish affairs, which fill a large space in these reports, are of little interest or value here, where there is no union of church and state, to give them authority even as precedents. On the other hand, there are many matters of the first importance, which by statute are brought within the jurisdiction of our Probate and Surrogate Courts, but which in England belong